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SUPREME COURT OF THE UNITED STATES

NO. 73-1121

NORTH GEORGIA FINISHING, INC., Petitioner

V.

DI-CHEM, INC., Respondent

THE FIRST NATIONAL BANK
OF DALTON, Garnishee

GRANT OF WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF GEORGIA

IN ITS CASE NO. 28,217

BRIEF OF RESPONDENT

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THE SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

RESPONDENT'S BRIEF

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THE SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

RESPONDENT'S BRIEF

PART I

(Rule 40 (1) (a))

PART II

(Rule 40 (1) (b))

PART III

(Rule 40 (1) (c))

The Respondent Di-Chem, Inc., has no supplemental statement under Parts I, II, and III by Petitioner, North Georgia Finishing Company, except to submit that the issues raised by Petitioner, North Georgia Finishing Company, are moot, and, therefore the Court should decline to accept jurisdiction of this case or else refuse to rule on the merits for the reasons set forth in Part VI of this brief. *DeFunis v. Odegaard*, ____ U.S. ____, 94 S. Ct. 1704 (1974).

PART IV

(Rule 40 (1) (d) (1))

QUESTIONS PRESENTED FOR REVIEW

(1) Are the issues purportedly raised by Petitioner moot in view of Petitioner having had a bond posted by an affiliate corporation dissolving the garnishment process herein contested and having obtained all moneys originally subject to the garnishment?

(2) Does the due process clause of the Fourteenth Amendment require prior notice of a garnishment of a bank account of a debtor corporation under circumstances as would permit the debtor corporation to remove its property from the jurisdiction of the Court in the event of the giving of prior notice, and is not the property right of the debtor protected by the requirement of a bond for double the amount of the sum sued for under the provisions of Georgia Code Section 46-101, et seq.?

(3) Should the case of *Fuentes v. Shevin*, 407 U. S. 67 (1972), even if controlling of the due process issue be given retroactive application contrary to established legal principles?

PART V

(Rule 40 (1) (e))

STATEMENT OF FACTS

A Whitfield County, Georgia corporation, Di-Chem, Inc., filed a complaint on August 20, 1971, in the Superior Court of Whitfield County against North Georgia Finishing, Inc., alleging that the defendant was a foreign corporation and was indebted to the plaintiff in the sum of $51,279.17 for goods sold to the defendant.

Simultaneously with the filing of this complaint, Di-Chem, Inc., pursuant to the terms of Georgia Code Annotated Section 46-101, et seq., filed an affidavit and a bond for process of garnishment to issue against the First National Bank of Dalton as garnishee (A 3-4). This garnishment was issued pursuant to the statute as it contained the necessary allegations of fact and the required bond in double the amount sought in the original suit so as to protect the defendant-debtor in the event plaintiff's action should not have any foundation in fact or should be defeated (A 5). The garnishment was based upon the signed affidavit of fact of the President of plaintiff corporation that "affiant has reason to apprehend the loss of said sum or some part thereof unless process of garnishment issue." (A-4). Thereupon, process issued and was served by the Deputy Sheriff of Whitfield County, Georgia, on the First National Bank of Dalton on August 20, 1971. (A-8).

There is nothing in the record before this Court to indicate the sum of money in the bank account, nor to indicate that it was other than the general banking account of the defendant-debtor. The statement on page 3 of the Peti-

tioner's Brief that it constituted a "payroll account" is not supported by the record and should be disregarded. Likewise, the statement in Petitioner's brief that the First National Bank of Dalton rejected all weekly payrolls and other presented checks of North Georgia Finishing, Inc., and created a serious labor crisis and credit embarrassment for said company is not in the record and therefore should be ignored by the Court. In any event even if said statements were true they would be irrelevant to the issues before the Court.

On Monday, the first regular business day following the service of garnishment on Friday and pursuant to the terms of the Georgia statute, the defendant posted a bond. A Mr. Daniel Mathews signed both for the principal, North Georgia Finishing, Inc., and for its bondsman, Beaver Creek Industries, Inc., designating himself as Vice President of both companies (A-9). We do not *know* the reason for posting the bond other than to dissolve the garnishment and release the bank account. The statement in Petitioner's Brief that it was also "for the purpose of creating standing" is a mere supposition of counsel and is not a statement which should be accepted by this Court as a "fact" in consideration of the merits of the case. Counsel could have attacked the garnishment in other ways either in the State or Federal Courts, but in any event failed to file any attack on the garnishment for three weeks. (A 12).

Petitioner was apparently notified of this garnishment on August 21, the same day it was served on the bank because it posted a dissolution bond on Monday, August 23, and the Judge of the Whitfield Superior Court entered the following order:

> "It appearing to the Court that the defendant in the within case has filed a proper dissolution bond

dissolving the within garnishment, it is thereupon considered ordered and adjudged that said garnishee, the First National Bank of Dalton, Dalton, Georgia, be hence discharged.

This 23 day of August, 1971.

/s/ Robert L. Vining, Jr.
J. S. C. C. C. "
(Judge, Superior Court
Conasauga Circuit) (A-10)

More than *three weeks after* posting the bond, North Georgia Finishing, Inc., filed a "Motion to Dismiss" the garnishment as being "Unconstitutional" and not meeting certain technical requirements of the Georgia law. (A-11, 12). After a thorough hearing on the merits of the motion with movant having an opportunity to present facts and law, the Trial Court overruled the motion on November 29, 1971. (A-13).

Thereafter, the case worked its way through the Georgia appellate procedure as outlined in Part I, Rule 41 (a) of the Petitioner's Brief and is now before this Honorable Court.

PART VI

(Rule 40 (1) (g))

ARGUMENT AND CITATION OF AUTHORITY

I. THE ISSUE OF THE VALIDITY OF THE GARNISHMENT WAS RENDERED MOOT BY THE POSTING OF BOND WITHOUT A PRIOR OR SIMULTANEOUS ATTACK ON THE GARNISHMENT AND BY THE TRIAL COURT'S DISSOLUTION OF THE GARNISHMENT.

In the case of *Roberts v. Seanor*, 46 Ga. App. 5, 166 S. E. 375 (1932), the Court of Appeals of Georgia stated the Georgia law as follows:

> "The dissolution bond takes the place of the property or fund garnisheed, and is conditioned to pay whatever judgment might be obtained against the garnishee or the funds sought to be impounded."

Therefore, the process of garnishment at the time the debtor sought to make a constitutional attack thereon, ***had already been dissolved and any issue concerning the original garnishment had become moot.*** Moreover, both the principal and the bondsman are no longer in business or else dissolved or bankrupt according to counsel's best knowledge, information, and belief and therefore there are no property rights now at stake. It is a well established rule that moot issues will not be considered by this Court although serious Constitutional rights may have been involved in the Court below. This principle was most recently reaffirmed by this Court in the case of *DeFunis v. Odegaard, supra.*

II. THE FACTS OF THIS CASE MORE CLEARLY FALL WITHIN THE COURT'S OPINION AND THE DIRECTION OF THE COURT INDICATED IN THE CASE OF *MITCHELL V. W. T. GRANT COMPANY*, NO. 72-6160, 42 L.W. 4671 (May 13, 1974), THAN THEY DO WITHIN THE CASE OF *SNIADACH V. FAMILY FINANCE CORPORATION OF BAY VIEW*, 395 U. S. 337 (1969) OR ITS PROGENY, INCLUDING *FUENTES V. SHEVIN*, 407 U. S. 67 (1972).

This Court has long recognized that some summary seizure procedures fall within properly recognized exceptions which may well meet the requirements of due process in certain situations. *Fahey v. Mallonee*, 332 U. S. 245; and *Ewing v. Mytinger & Casselberry*, 339 U. S. 594. Also, the Court has recognized summary seizure by the Internal Revenue Service of property of taxpayers for alleged undue taxes without any previous hearing, as to whether the tax was due. Although not all of the facts were in the complaint or before this Court, it can read between the lines. It has been established based on its affidavit and the Trial Court's hearing on the merits thereof that Di-Chem, Inc., had cause to apprehend the loss of the money. In the case *sub judice* the Court is not dealing with parties with relative dissimilar powers or a contract of "adhesion" as in the case of *Mitchell v. W. T. Grant Company, supra.* Here the Court is dealing with a complaint by one corporation against another corporation wherein the President of the suing corporation whose word was accepted by the trial court has made an affidavit that it has reason to apprehend that unless a garnishment issue, that it has reason to apprehend a loss of over $50,000.00. It is a reasonable assumption that if the debt could not be collected except by suit that the debtor is insolvent or may even remove its property out of the State of Georgia and that the money in the bank ac-

count would not be forthcoming to pay any indebtedness. The Court overruled a motion of North Georgia Finishing based on its allegations that "Plaintiff (Di-Chem) . . . had no reason to apprehend the loss of any part of any judgment . . . and therefore (plaintiff) had no grounds upon which to base said writ of garnishment." (A-13) Since the Trial Court overruled this motion after hearing argument and/or evidence, this clearly indicates that Di-Chem had a valid reason for the issuance of the garnishment including possible loss of $51,279.17. North Georgia Finishing, Inc., was protected by Di-Chem's filing of a bond in double the amount for which it sued and if Di-Chem's suit was groundless, North Georgia had the opportunity to recover up to double the sum for which it had been sued. When "weighing the balances" under the due process clause, it appears in the instant case that the interests of Di-Chem, Inc., in preventing a debtor from absconding is no less important than the interest of the Federal Government in collecting its taxes by the filing of liens and the seizure of property without a bond or other methods to attack the action or to secure release of the property as is provided under the Georgia Garnishment Statutes. As stated in *Fuentes v. Shevin, supra,* there are "extraordinary situations" which justify postponing an opportunity for a notice and a hearing, one of these being a general public interest which respondent submits is here involved. First, the public interest in having debts paid and not having the sums moved out of the state and secondly, the need for *prompt* action which is evident here because if *prompt* action had not been taken, it can be reasonably assumed that the defendant debtor would have removed its property from the state or at least withdrawn all sums from the garnishee bank.

If the defendant were given notice of a hearing as to why a garnishment should not issue, the defendant would always have the opportunity of withdrawing its funds and

removing them from without the jurisdiction or otherwise dispose of the funds. The recent case of *Mitchell v. W. T. Grant Company*, affirming 263 La. 627, 269 So. 2d 186, is clearly a retreat from the broad statement in *Fuentes v. Shevin, supra*, relied upon by Petitioner in its brief.

The writ in the lower Court in *Mitchell v. W. T. Grant Company, supra*, was obtainable on the creditor's *ex parte* application without notice to the debtor or an opportunity for a hearing prior to the issuance and levy of the writ. In the *Mitchell* case, as in the instant case, the writ issued on a verified form affidavit and the creditor giving sufficient bond. In the particular Louisiana transaction involved the case began by the presentation of the affidavit to a city judge, whose qualifications are unknown, but the Louisiana Statute [Articles 282 and 283] provides generally that a Clerk of Court may issue the writ except in the Orleans Parish. It appears that in the *Mitchell* case and in the instant case that whether or not a judge or a clerk had the responsibility of issuing the writ or the garnishment, that based on the affidavit of the requisite facts, that the writ would have been issued in Louisiana either by the judge or by the Clerk of Court just as the Summons of Garnishment issued in Georgia under the Georgia Statute. As in the Louisiana case, the Georgia law provides that the debtor may immediately seek dissolution of the writ and, indeed in the case now before the Court, the debtor dissolved the garnishment within three days and regained possession of the bank account. Counsel respectfully submits that the Georgia statutory procedure as stated by this Court in the Louisiana case "effects a constitutional accommodation of the conflicting interests of the parties." To paraphrase the language of the Court in the case of *Mitchell v. W. T. Grant Company, supra*, counsel for the respondent "cannot accept the Petitioner's broad assertion that the due

process clause of the United States Constitution guaranteed to him (it) the use and possession of the goods (money) until all issues in the case were judicially resolved after full adversary proceedings had been completed." In the Louisiana case there was a contract between the parties and the contract was a contract of "adhesion." However, in the instant case, there is no disparity between the relative position of the creditor and debtor and the "constitutional accommodation" resolves itself down to whether the debtor is to be protected by the filing of a bond by the creditor or whether the creditor is to be left without recourse in the face of the debtor's clear opportunity to remove its property once it has notice of a possible garnishment. In the Louisiana case as in this case, the debtor "is permitted to regain possession by putting up his own bond to protect the seller (creditor)." 42 *Law Week* 4674. Indeed, in the Louisiana case, the debtor did not even file a bond! The following quote of the Court from that case is apropos of the facts in this case:

> "The issue at this stage of the proceeding concerns possession pending trial and turns on the existence of the debt, the lien, and the delinquency. These are ordinarily uncomplicated matters that lend themselves to documentary proof; and we think it comports with due process to permit the initial seizure on sworn ex parte documents followed by the early opportunity to put the creditor to his proof. The nature of the issues at stake minimizes the risk that the writ will be wrongfully issued by a judge. The potential damage award available, if there is a successful motion to dissolve the writ, as well as the creditor's own interest in avoiding interrupting the transaction, also contribute to minimizing the risk."

Finally, the following paraphrase and quote from the Louisiana case is appropriate to the facts involved in the case now before the Court:

> "Forth, we remain unconvinced that the impact on the debtor (North Georgia Finishing) of deprivation of the household goods (bank account) here in question overrides his (North Georgia's) inability to make the creditor (Di-Chem) whole for wrongful possession, the risk of destruction or alienation if notice and a prior hearing is supplied, and the low risk of a wrongful determination of the existence of possession (indebtedness) * * * * *."

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginative situation. *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895 (1961); *Stanley v. Illinois* 405 U. S. 645, 650 (1972)."

Again, as stated in *Mitchell v. W. T. Grant Company, supra,* at page 4675, this Court had unanimously approved "prejudgment attachment liens effected by creditors without notice, hearing or judicial order saying that:

> "More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors, without notice, hearing or judicial order, saying that "nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its affect upon the result of the suit." *"The fact that the execution is issued in the first instance by an agent of the State, but not from a Court, followed as it is by personal*

> *notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection." Coffin Brothers v. Bennett,* 277 U. S. 29, 31 (1928). To the same effect was the earlier case of *Ownbey v. Morgan,* 256 U. S. 94 (1921). Furthermore, based on *Ownbey* and *Coffin,* the Court later sustained the constitutionality of the Maine attachment statute. *McKay v. McInnes,* 279 U. S. 820 (1928). In that case, a nonresident of Maine sued in the Maine courts to collect a debt from a resident of the State. As permitted by statute, and as an integral part of instituting the suit, the creditor attached the properties of the defendant, without notice and without judicial process of any kind."

Insofar as the record reveals, the bank account was the only asset of the debtor available to satisfy the indebtedness of North Georgia and Di-Chem's "interest" of $51,279.17. Therefore, counsel for respondent respectfully submit that in view of this "interest," and all of the facts heretofore explained, that the language of this Court in *Fuentes v. Shevin, supra,* applies to this appeal:

> "There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods." 407 U. S. 679.

Again, as stated in part by Mr. Justice White in his dissent in *Fuentes v. Shevin, supra,* at page 99 "Dollars and cents considerations weigh heavily against false claims . . . as well as against precipitate action that would allow no opportunity for mistakes to surface and be corrected."

The United States Courts of Appeals and District

Courts have not been unanimous in their interpretation of *Sniadach v. Family Finance Company of Bay View, et al*, 395 U. S. 337 (1969), *supra*, or *Fuentes v. Shevin, supra*, and the decisions of these lower courts is clearly not controlling on the Supreme Court.

Therefore, the decision in *Morrow Electric Co., Inc. v. Harold R. Cruse*, et al, C.A. 19008 (U.S.D.C. N. D. of Georgia) cited by petitioner should not be given any more weight than the case of *American Olean Tile Co. v. Zimmerman*, 317 F. Supp. 150 (1970), wherein the similar Hawaii garnishment statute was upheld or of the decision below of the Supreme Court of Georgia.

III. THE DECISION OF *FUENTES V. SHEVIN, SUPRA*, SHOULD NOT BE GIVEN RETROACTIVE APPLICATION.

It is clear that constitutional decisions may be made prospective only. *Linkletter v. Walker*, 381 U. S. 618, 85 S. Ct. 1731, 14 L.Ed. 2d 601 (1965). As stated in the case of *Ruotolo v. Gould*, 489 Fed. 2d 1324:

> "This form of judgment is particularly appropriate where retroactive application would have severe hardship to those who have relied upon the trial law in arranging their affairs. See 1 B. Moores, *Fed. Prac.* at 200, 201. In this circuit the federal courts called upon to declare invalid statutory schemes similar to the one in issue here have found that giving retroactive effect to their rulings would be unduly harsh and have therefore denied relief to those whose attachment proceedings had commenced prior to the effective date of the judgment."

In the cited case, the Court had struck down as illegal an attachment of a bank account in proceedings under New Hampshire law on the basis of denial of due process was illegal for failure to provide due process protection under the case of *Fuentes v. Shevin, supra.* In the case of *Trapper Brown Construction Co., Inc. v. Electro Mech, Inc.*, 358 F. Supp. 105 (1972), a case also involving garnishment, is was held that the ruling was not to have retrospective application. Likewise in the case of *Clement and R.E.I.C.O. Inc. v. Four North State Street Corporation, et al,* 360 F. Supp. 933 (1973), the Court held that inasmuch as a retrospective judgment would cast doubt on the validity of certain attachments pending in the New Hampshire courts that the ruling of unconstitutionality of Chapter 511 of the statute *would not be given* retrospective application:

> "Since a retrospective judgment would cast doubt on the validity of all real estate attachments in actions now pending in the New Hampshire courts and would create a cloud on the title to any property hitherto sold pursuant to a real estate attachment, our decree will be prospective only and will have no effect on any attachments, other than the attachment presently before us, which have been made prior to the date of this opinion."

In view of the foregoing rulings and in view of the fact that the garnishment laws of Georgia have never been declared unconstitutional or stated to be unconstitutional until this Court's decision in *Fuentes v. Shevin, supra,* in June of 1973, some *two years after* the filing of the complaint in the present case, the still unclear holding of *Fuentes v. Shevin, supra,* should not be given retrospective application. Since North Georgia Finishing has filed a bond and dissolved the garnishment and in view of all the facts

and law cited herein, counsel respectfully submits that the status of the parties in this case should not be changed by this Court.

PART VII

(Rule 40 (1) (h))

CONCLUSION

WHEREFORE, in view of the law and facts stated herein, this Court should decline to rule on this case because the issues are moot. If it determines to rule on the merits counsel respectfully submit it should not strain the due process clause to require prior notice and a hearing when the very requirement of a notice and a hearing will frustrate the objects of commerce in the collection of debts validly made and strike down a procedure which has already "balanced the interests."

Respectfully submitted,

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PART VIII

STATEMENT OF CASES AND STATUTES CITED

American Olean Tile Company v. Ralph E. Zimmerman, Jr.,
317 F. Supp. 150 (D. Hawaii, 1970)

Clement and R.E.I.C.O., Inc. v. Four North State Street Corporation, 360 F. Supp. 933 (1973)

DeFunis v. Odegaard,
____ U.S. ____, 94 S. Ct. 1704 (1974)

Ewing v. Mytinger and Casselberry,
339 U. S. 594 (1950)

Fahey v. Mallonee,
332 U. S. 245 (1950)

Fuentes v. Shevin,
407 U. S. 67 (1972).

Georgia Code § 46-101, *et seq.*

Linkletter v. Walker,
281 U. S. 618, 85 S. Ct. 1731, 14 L.Ed. 2d 601 (1965)

Mitchell v. W. T. Grant Company
No. 72-6160, 42 L.W. 4671 (May 13, 1974)

Morrow Electric Co., Inc. v. Harold R. Cruse,
C.A. 19008 (U.S.D.C. N.D. of Georgia)

Roberts v. Seanor,
46 Ga. App. 5, 166 S. E. 375 (1932)

Ruotolo v. Gould,
489 Fed. 2d 1324

Sniadach v. Family Finance Corporation of Bay View,
395 U. S. 337 (1969)

Trapper Brown Construction Co., Inc. v. Electro Mech, Inc.,
358 F. Supp. 105 (1972)

PROOF OF SERVICE

GEORGIA, WHITFIELD COUNTY.

I, LEMUEL HUGH KEMP, Attorney for Respondent, Di-Chem, Inc., in Case No. 73-1121, October Term, 1973, in the Supreme Court of the United States, do hereby swear that on this the 5th day of Aug, 1974, I served a copy of the foregoing Brief of Respondent on North Georgia Finishing, Inc., Petitioner, and The First National Bank of Dalton, Garnishee, by mailing with sufficient postage thereon, three copies of the foregoing Brief to their counsel of record, Warren N. Coppedge, Jr., Esq., Mitchell, Mitchell, Coppedge and Boyett, P. O. Box 668, Dalton, Georgia 30720, of counsel for Petitioner, and Carlton McCamy, Esq., McCamy, Minor, Phillips & Tuggle, P. O. Box 1105, Dalton, Georgia 30720, of counsel for the Garnishee.

s/ L. Hugh Kemp
LEMUEL HUGH KEMP
ATTORNEY FOR RESPONDENT
P. O. Box 398
Dalton, Georgia 30720

Sworn to and subscribed before me,

this the 5th day of Aug., 1974:

s/ Henry C. Thorpe, Jr.
NOTARY PUBLIC, GEORGIA STATE AT LARGE